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No. 364

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (R. 127-132) is reported at 183 F. 2d 453. The United States District Court for the Northern District of Illinois entered no written opinion.

JURISDICTION

The judgments of the Court of Appeals were entered on July 19, 1950 (R. 132-135). The petition

for a writ of certiorari was filed on October 16, 1950, and granted on December 4, 1950 (R. 143). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether pending suits for the recovery of damages for sales at prices in excess of those established by applicable regulations under the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901, *et seq.*), may be maintained by the United States in its own name, or must be maintained in the name of the Secretary of Commerce.

EXECUTIVE ORDERS AND RULE INVOLVED

Executive Orders 9841 (12 F. R. 2645) and 9842 (12 F. R. 2646) are set forth in the Appendix, *infra*, pp. 46-54.

Rule 25(d) of the Federal Rules of Civil Procedure, as it read when the district court granted the motion to substitute the United States,[1] provided:

> (d) *Public Officers: Death or Separation From Office.*—When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency or any other officer specified in the

[1] Because of the repeal of 28 U. S. C. 780 and its omission from the 1948 version of 28 U. S. C., Rule 25(d) has been amended to eliminate the reference to that section and instead to enumerate specifically those governmental officers formerly referred to in the Rule by a general reference to the statutory provision.

Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

STATEMENT

The six cases here involved were brought in the United States District Court for the Northern District of Illinois under Section 205(e) of the Emergency Price Control Act of 1942 as amended (50 U. S. C. App. 925(e)), for the recovery of damages for sales allegedly at prices in excess of the maximum prices prescribed by applicable OPA regulations (R. 6-7, 34-37, 54-58, 74-78, 94-96, 112-114). Complaints against Allied Oil Corp., P. & M. Liquor Corp. and Nicro Steel Products,

Inc. were filed on July 10, 1944, November 1, 1944 and May 21, 1945, respectively, all in the name of Chester Bowles, Price Administrator (R. 6, 34, 54). Two complaints, those against Harvey, Inc. and Eva Metnick, were filed on April 26, 1946 and December 3, 1946, respectively, by Paul A. Porter, then Price Administrator (R. 74, 94). The complaint against Jack Stein and Harry Robins was filed April 15, 1947 by Philip B. Fleming, Temporary Controls Administrator (R. 112).[2] The complaint in each action expressly recited that the action was brought "for and on behalf of the United States."

Thereafter, in due course, the names of successor Price Administrators were substituted as plaintiff in each case within six months after the successor took office (R. 8, 38, 58-59, 79, 97).

The cases were pending in this posture when, on April 23, 1947, the President, in accordance with the direction of Congress (Urgent Deficiency Appropriation Act, 1947, 61 Stat. 14, 16), issued Executive Order 9841 (Appendix, *infra*, pp. 46-52) providing for the liquidation of the Office of Temporary Controls and distributing the functions which had been lodged, first, in the Price

[2] OPA Supplementary Order 193 (11 F. R. 13464) decontrolled, as of November 10, 1946, all the commodities of which overceiling sales were alleged in the six suits, but Section 1(b) of the Emergency Price Control Act (50 U. S. C. App. 901(b)) provided "that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

Administrator and, then, in the Office of Temporary Controls, among the Housing Expediter, the Secretary of Agriculture, the Reconstruction Finance Corporation, and the Secretary of Commerce. Also, on April 23, 1947, the President issued Executive Order 9842 relating to the conduct of certain litigation under wartime legislation and providing that as of June 1, 1947 (Appendix, *infra*, p. 53):

> 1. The Attorney General is authorized and directed, in the name of the United States, or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:
>
> * * * * *
>
> (b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;
>
> * * * * *

Within six months of June 1, 1947, the effective date of the material provisions of the Executive Orders, the Government obtained orders from the district court substituting the United States as plaintiff in each case (R. 9, 39, 60, 79, 97, 115). Two and one-half years later, on January 9, 1950, the district court, upon motion of the defendants, determined that the United States was not the real party in interest and that the Secretary of Commerce was the real party in interest. Accordingly, orders were entered vacating the prior orders which had substituted the United States as plaintiff and dismissing the actions because the Secre-

tary of Commerce had not been timely substituted as plaintiff (R. 17-20, 39-42, 60-62, 80-82, 98-100, 119-121).

Upon the Government's appeals, the Court of Appeals for the Seventh Circuit held that, under Executive Orders 9841 and 9842, treble damage actions originally instituted in the name of the Price Administrator, as authorized by Section 205(e) of the Emergency Price Control Act, could be maintained, after the termination of the Office of Temporary Controls, the successor agency to the Office of Price Administration, only in the name of the Secretary of Commerce, and that the United States could not be substituted as party plaintiff in such actions (R. 128-132). The court, accordingly, affirmed the orders of the district court (R. 132).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the President was without authority to direct that these price control treble damage actions should be maintained in the name of the United States.

2. In construing Executive Orders 9841 and 9842 as directing that these actions be maintained in the name of the Secretary of Commerce.

3. In failing to hold that, if the Secretary of Commerce is the proper plaintiff, he might now be substituted.

4. In affirming the district court's dismissal of these actions.

SUMMARY OF ARGUMENT

The holding below that the treble damage actions, originally instituted by the Price Administrator on behalf of the United States and pending at the termination of the Office of Temporary Controls, must be maintained in the name of the Secretary of Commerce, rather than the United States, is based on a double error: (1) the court's erroneous assumption that the President was without power to direct that such suits be brought in the name of the United States, and (2) a misreading of Executive Orders 9841 and 9842.

I

The President, we submit, had the power to direct that these treble damage actions be continued in the name of the United States. Section 205(e) of the Emergency Price Control Act, stressed by the court below, does not preclude such direction by the President; that Section on its face merely authorized the Price Administrator to bring these actions and does not purport to require him to bring them in his own name rather than in the name of the United States, the real party in interest. Moreover, such power not only may be inferred from Section 1(b) of the Price Control Act, providing for the survival of these actions after the Price Administrator had ceased to exist, but also is plainly vested in the President by Section 1 of the First War Powers Act. These provisions, already invoked to support the President's trans-

fer of the Price Administrator's functions to the Temporary Controls Administrator (*Fleming* v. *Mohawk Co.*, 331 U. S. 111), clearly authorized the President to designate the United States *eo nomine*, as well as any governmental representative acting on its behalf, as a further successor to the Price Administrator for the purpose of maintaining these actions. In addition, the Price Administrator was nothing more than an *alter ego* of the United States with respect to price control matters. The Office of Price Administration was no different from any regular department or other establishment of the Government. In instituting these actions, the Price Administrator was performing purely governmental functions and was acting on behalf of the United States, as is expressly stated in Section 205(e) and the complaints here. The United States being the real party in interest, there is no obstacle to instituting such actions in its name or, as here, to substituting it as party plaintiff after the action had been begun by the Price Administrator.

II

The reading below of the Executive Orders not only stands alone, but is in square conflict with the plain language of Executive Order 9842. That Order explicitly vests authority in the Attorney General to maintain treble damage actions in the name of the United States; on the other hand, Sections 302 and 402 of Order 9841, the

provisions specifically relied on below, are by their own terms subordinated to these provisions of 9842. Moreover, the reading below creates a conflict between the provisions of the Executive Orders as to the furnishing of staff to handle the litigation; no conflict would result under our construction of the orders. Finally, since under its reading, the Secretary of Commerce's sole connection with these actions is the lending of his name as nominal plaintiff, the court below not only reached a capricious result but distorted the logical scheme of the orders whereby the maintenance of litigation was to be merely an adjunct to the transfer of some function to which the litigation is related. The construction of the orders which we urge is fully supported by the unanimous agreement among the Office of Temporary Controls, the Department of Justice, and Department of Commerce, the executive agencies involved, that the Executive Orders authorized the Attorney General to continue these suits in the name of the United States.

III

If this Court concludes that the Secretary of Commerce is the only proper plaintiff in these actions, we believe that the Court should direct that the Government now be permitted to substitute the Secretary of Commerce notwithstanding the expiration of the six-months' period specified in Rule 25 (d) of the Federal Rules of Civil Procedure.

The court below has previously held that Rule 25 (d) is applicable to actions for treble damages under Section 205 (e) of the Emergency Price Control Act. The Courts of Appeals for the Eighth, Ninth and Tenth Circuits have held, to the contrary, that Rule 25 (d) does not apply to actions brought on behalf of the United States and in which the United States has at all times been the sole real party in interest, and that the United States may be substituted as plaintiff in such cases without regard to the six-months' requirement of that Rule. We believe that the latter construction is both realistic and consistent with the history and purposes of Rule 25 (d), and should apply as well to the substitution of any proper nominal plaintiff representing the United States.

ARGUMENT

The holding below that these treble damage actions, although originally instituted by the Price Administrator on behalf of the United States, are now maintainable only in the name of the Secretary of Commerce, an official of the United States Government, but not in the name of the United States, raises only the narrow question as to the name in which those actions may be prosecuted on behalf of the United States. Even under the holding below, the sole relationship of the Secretary of Commerce to these actions is the use of his name as plaintiff; all other duties in regard thereto, the court below admitted (R. 131), were to be per-

formed—and in fact have been performed—by the Department of Justice under the Attorney General.

The court below purported to ground its holding that the Secretary of Commerce is the only proper party plaintiff in these actions (1) on the text of the Executive Orders, which the court below read as an "authoritative transfer [by the President] to the Secretary of Commerce of the remaining functions of price control, including the right to maintain actions such as these in his own name" (R. 130), and (2) on Section 205(e) of the Emergency Price Control Act (50 U. S. C. App. 925(e)), which authorizes the Price Administrator to institute these actions in his own name. The court construed Section 205(e) as requiring these actions to be instituted only in the name of the Price Administrator or his successor, and as precluding the President from directing the substitution, as plaintiff, of the United States *co[illegible]mine*, which the court held, in effect, could not be a successor to the Price Administrator.

This decision is, we submit, based on a double error. Point I deals with what, in our view, is the basic difficulty with the reasoning below, *i.e.*, the court's failure to recognize that the President had the power to direct that these actions be continued in the name of the United States, particularly since the United States—not the Price Administrator or the Secretary of Commerce—is, and always has been, the real party in interest. In

Point II, we show that once this is recognized the court's construction of the Executive Orders is without foundation in the text of the orders. In Point III, we urge that if this Court determines that the Secretary of Commerce is the only proper plaintiff in these cases, the Government should be permitted to substitute him as plaintiff notwithstanding the expiration of the six-months' period referred to in Rule 25 (d) of the Federal Rules of Civil Procedure.

I

The President May Provide That Pending Treble Damage Actions Be Maintained in the Name of the United States

Pervading and coloring the holding below that Executive Orders 9841 and 9842 did not provide for the substitution of the United States as party plaintiff in the pending treble damage actions is the premise that the Congress, by permitting the Price Administrator in Section 205(e) of the Emergency Price Control Act to institute these actions in his own name, precluded the President from directing, after the termination of the Office of Price Administration, that the remaining actions be maintained in the name of the United States. According to the court below (R. 131):

> Obviously the President could not create new causes of action or vest a new party with a right of action lodged by act of Congress in another; that could have been done only by the Congress. It would seem clear then, that a direc-

> tion by the President to conduct suits in the name of the United States, when Congress had provided that the administrator or his successor should have this right, would be beyond the Executive's power.

This premise, we submit, has no merit.

In the first place, Section 205(e) does not purport to require the Price Administrator to institute in his own name treble damage actions such as here involved. That Section provides in pertinent part as follows:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, *the Administrator may institute such action on behalf of the United States* within such one-year period. [Italics supplied.]

This provision on its face merely authorizes the Price Administrator to bring these actions; nothing in its text supports the inference that such actions must be brought in the name of the Price Administrator rather than in the name of the United States.

Secondly, assuming for the moment that the Price Administrator has an interest in the litigation separate and distinct from that of the United

States, it does not follow that designating the United States as the party to be substituted as plaintiff in these treble damage actions would involve an unauthorized attempt by the President to "vest a new party with a right of action lodged by act of Congress in another" (R. 131). For there can now be no doubt, as even the court below appears to admit,[3] that the President has the power to designate a successor to the Price Administrator for the purpose of continuing these actions after the termination of the Office of Price Administration.

Section 1(b) of the Emergency Price Control Act (50 U. S. C. App. 901(b)), relating to the Act's termination date, provides that:

> as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act * * * shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

This provision, were it standing alone, would warrant an inference that such power of designating a successor resided in the President, for Congress by providing that the causes of action

[3] The recognition below of the President's power so to designate a successor is manifest not only from the quotations from the court's opinion, *supra*, pp. 11, 12-13, but also from the court's construction of Executive Orders 9841 and 9842 as a designation by the President of the Secretary of Commerce as the successor to the Price Administrator, for the purpose of continuing these actions in his name.

and the right to maintain them should remain alive after the Price Administrator designated in the statute to institute and maintain these actions had ceased to exist, obviously intended that some agency or department within the Executive should be charged with the enforcement of these causes of action.

However, it is unnecessary to rely solely on inference. Executive Orders 9841 and 9842 concerned "matters relating to the conduct of the present war" and were promulgated by the President within six months after "the termination of the war." Cf. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 115-116. Consequently, the President's designation of the United States in these Orders was within the broad powers vested in him by Section 1 of the First War Powers Act (55 Stat. 838, 50 U. S. C. App. 601), which Section authorized the President:

> to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title and to this end is authorized to make such regulations and to issue such orders as he may deem necessary * * *.

On the basis of these provisions, this Court in *Fleming* v. *Mohawk Co.*, 331 U. S. 111, has already

rejected contentions similar in their nature and effect to the holding below. In the *Mohawk* case, the Court sustained, as within his power, the President's transfer by Executive Order 9809 (11 Fed. Reg. 14281) of the Price Administrator's functions to the Temporary Controls Administration, and accordingly held that the Temporary Controls Administrator was properly substituted for the Price Administrator as the party plaintiff in the treble damage actions there involved. By the same token, we submit, the President has the authority to designate the United States *eo nomine*, as well as any governmental representative acting on behalf of the United States, as a further successor to the Price Administrator for the purpose of maintaining the present actions beyond the termination date of the Office of Temporary Controls.

Finally, the fact is that the Price Administrator had no interest separate and distinct from the United States, but rather was an *alter ego* of the United States with respect to price control matters. Consequently, a Presidential direction that these actions should be continued in the name of the United States would not involve attempting to "vest a new party with a right of action lodged by act of Congress in another" (R. 131), but rather would result in the continuation of the same action by the real party in interest.

The Office of Price Administration, of which the Price Administrator was the head, was merely an

administrative agency of the Government, created by Congress in Section 201(a) of the Emergency Price Control Act (50 U. S. C. App. 921(a)), for the purpose of administering the price control aspect of the Government's anti-inflation program. The Price Administrator himself was appointed by the President by and with the advice and consent of the Senate. See Section 201(a). His appointment of employees was subject to the civil-service laws, and all funds for operation of the agency, including payment of salaries, were furnished by Congress by annual appropriations. The Office of Price Administration was actually no different from any regular department or other establishment of the Government. The use of a name other than the United States was purely a convenient designation for a governmental agency charged with the administration of the Price Control Act, and in no way altered the basic governmental nature of the Office. As this Court stated in regard to another such agency, "In short, it [was] an integral part of the governmental mechanism. And the use of a name other than that of the United States cannot change that fact." *United States* v. *Remund*, 330 U. S. 539, 542; see, also, *Herren* v. *Farm Security Administration*, 153 F. 2d 76, 77-78 (C. A. 8); *Korman* v. *Federal Housing Administrator*, 113 F. 2d 743 (C. A. D. C.); *In re Hansen Bakeries*, 103 F. 2d 665, 666 (C. A. 3); *North*

Dakota-Montana Wheat Growers' Ass'n. v. *United States,* 66 F. 2d 573 (C. A. 8).

Moreover, although the Price Administrator instituted these treble damage actions in his own name, he was thereby discharging a governmental function, and, accordingly, acting on behalf of the United States. This is clear not only from the fact that these suits were authorized as one of the sanctions for obtaining compliance with the provisions of the Price Control Act in the public interest, but also from the very provisions of Section 205(e). That Section, in authorizing the Price Administrator to institute these actions, specifically directed that they be instituted "on behalf of the United States." And in conformance therewith, the complaints in the present actions were entitled in the name of the Administrator "for and on behalf of the United States," and judgment was demanded against the defendants "for and on behalf of the United States." See, *e.g., Larson* v. *Domestic and Foreign Corp.,* 337 U. S. 682, 686; *Louisiana* v. *McAdoo,* 234 U. S. 627, 629; *Seven Oaks* v. *Federal Housing Administration,* 171 F. 2d 947 (C. A. 4). Clearly, therefore, the Price Administrator "was not authorized to bring [these actions] on his own behalf." (*Fleming* v. *Goodwin,* 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nomine Goodwin* v. *United States,* 334 U. S. 828), and he was "no more than a nominal plaintiff * * *. The United States, on behalf of which the action was brought, was

the real plaintiff. * * * Whether the action is maintained by an official authorized to sue on its behalf, or by the United States in its own name, the real plaintiff remains the same." *United States* v. *Koike*, 164 F. 2d 155, 157 (C. A. 9). See, also, *Northwestern Lumber & Shingle Co.* v. *United States*, 170 F. 2d 692, 694 (C. A. 10); *Porter* v. *Maule*, 160 F. 2d 1, 3 (C. A. 5); *Bowles* v. *Goldman*, 7 F. R. D. 12 (W. D. Pa.); *United States* v. *Saunders Petroleum Co., Inc.*, 7 F. R. D. 608 (W. D. Mo.); *Porter* v. *American Distilling Co.*, 71 F. Supp. 483, 488 (S. D. N. Y.).[4]

Thus, the United States has always been the real plaintiff—the real party in interest—in treble damage actions such as those here involved. And as the real party in interest, the United States could have instituted these actions in its own name, notwithstanding the fact that the Act permitted the Administrator to name himself as plaintiff. See *United States* v. *Summerlin*, 310 U. S. 414; *United States* v. *Remund*, 330 U. S. 539; *Cherry Cotton Mills* v. *United States*, 327 U. S. 536; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524; *Federal Housing Administration* v. *Burr*, 309 U. S. 242, 249-250. In the *Summerlin* case, where the Government sought to assert, in the name of the

[4] The other provisions of Section 205 stressed by respondents (Br. in Opp. 8-9), do not demonstrate that the interest of the Price Administrator was separate and distinct from the United States. These provisions merely deal with the allocation of duties within the Executive and do not destroy the essential identity of the Price Administrator and the United States.

United States, a claim assigned to the Federal Housing Administrator who was authorized "in his official capacity, to sue and be sued in any court of competent jurisdiction" (12 U. S. C. 1702), the Court stated (310 U. S. at 416):

> The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

Similarly, in the *Remund* case, the question related to whether the priority accorded by R. S. 3466 (31 U. S. C. 191) in a decedent's estate to debts owed to the United States applied to claims filed in the name of the Governor of the Farm Credit Administration on notes executed to him; the Court there held that the debts were owed to the United States, and further that it is immaterial whether the claim be filed in the name of the United States or the name of the officer or agency; "in the latter instance, the claim is necessarily filed on behalf of the United States and the legal effect is the same as if it had been filed in that name. * * * The claim was filed in the name of the Governor of the Farm Credit Administration 'for and on behalf of the United States of America'—an explicit recognition of the legal realities involved." 330 U. S. at 542-543. And in *Cherry Cotton Mills,* the Court held that the claim of the

Reconstruction Finance Corporation could be asserted as a counter-claim "on the part of the Government of the United States" within the meaning of the then 28 U. S. C. 250(2) (now 28 U. S. C. 1503, as revised); "that the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes." 327 U. S. at 539.

The substitution of the United States as party plaintiff in these enforcement actions, accordingly, does not involve the creation of new causes of action nor the vesting of a new party with the right of action lodged in another, as the court below held (R. 131), but rather the continuation of the same action by the real party in interest. And since no change in the cause of action is thereby affected and the defendant is in no way prejudiced, there would seem to be no obstacle to substituting the United States as plaintiff, after the action has been begun by the Price Administrator. Cf. *State of Nebraska* v. *Hayden*, 89 Fed. 46 (C. C. D. Neb.); *Winthrop* v. *Farrar*, 11 Allen (93 Mass.) 398, 400; *Lake Shore and M. S. Railway Company* v. *City of Elyria*, 69 Ohio St. 414; cf. *Irving Trust Company* v. *American Silk Mills, Inc.*, 72 F. 2d 288, 290 (C. A. 2), certiorari denied, 293 U. S. 624. This, of course, would be consistent with the general purposes sought to be attained by Rules

45(a), (b), 17(a), and 21 of the Federal Rules of Civil Procedure.

Based on considerations such as we have just set out, a number of courts of appeals, particularly those for the Eighth, Ninth, and Tenth Circuits have held, as stated by the Eighth Circuit that treble damage actions such as those at bar are "in substance and reality, at all times a controversy between the Government and [respondents]", warranting the substitution of the United States as plaintiff. *Fleming* v. *Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nomine Goodwin* v. *United States*, 334 U. S. 828; *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9); *Northwestern Lumber and Shingle Co.* v. *United States*, 170 F. 2d 692 (C. A. 10).[5] In these circumstances, permitting these actions to continue in the name of the United States, "is not technically a matter of making a new party at all" (*United States* v. *Koike*, *supra* at 157 (C. A. 9)), but "merely amounted to the substitution of the United States, the real party in interest, as the party plaintiff" (*Northwestern Lumber & Shingle Co.* v. *United States*, 170 F. 2d 692, 694 (C. A. 10)). "The only purpose of substitution in such a case is to keep the record straight so that the judgment finally entered

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[5] See also, *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112 (C. A. 8); *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4); *Porter* v. *Steger*, 74 F. Supp. 109, 113 (D. Md.); *Fleming* v. *People's Natural Gas Co.*, 8 F. R. D. 42, 45 (W. D. Pa.); cf. *Porter* v. *Maule*, 160 F. 2d 1, 3 (C. A. 5).

will unquestionably bind the right parties." *Fleming* v. *Goodwin*, *supra* at 338. Accordingly, the substitution of the United States as party plaintiff "amounts to nothing more than a formal amendment to the title of the action to conform it to the truth" (*ibid.*).

Bowles v. *Wilke*, 175 F. 2d 35 (C. A. 7), certiorari denied, 338 U. S. 861, relied on by the court below (R. 130) as well as by respondents (Br. in Opp. 7-8), is distinguishable from the cases at bar; the language of the court's opinion, if anything, would appear to support the Government's position here. That case involved a treble damage action originally brought in the name of Chester A. Bowles, as Price Administrator, in which the successor Price Administrators had not been substituted within six months, as thought to be prescribed by Rule 25(d) of the Federal Rules of Civil Procedure. As stated by the court, the sole issue before it was "whether the action had abated due to the failure of Bowles' successor to make timely application for substitution" (175 F. 2d at 38), and in answering that question in the affirmative,[6] the court made the statement quoted by respondents (Br. in Opp. 7-8). The court in this statement does not deny that the United States was the real party in interest in such cases, but rather adopts the view that irrespective of that fact, Rule 25(d)

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[6] The Government believes that the court's decision on this issue is erroneous. See *infra*, pp. 37-44.

is applicable. Morever, in holding Rule 25(d) to be applicable, the court attempted to distinguish several of the cases cited, *supra*, pp. 22-23, in which the United States had been permitted to be substituted, not on the ground that such substitution was improper, as the court has now held, but rather on the ground that in those cases the substitution of the United States as the Price Administrator's successor had been timely. 175 F. 2d at 39-40. Since the substitution of the United States in the instant cases was within the prescribed period, it would follow, on the basis of the court's distinction in the *Wilke* case, that these actions should not have been dismissed as abated.

II

Executive Orders 9841 and 9842 Authorized the Substitution of the United States, Not the Secretary of Commerce, as the Party Plaintiff in Pending Treble Damage Actions

The reading below of the Executive Orders, as designating the Secretary of Commerce to be the plaintiff to be substituted in the pending treble damage actions, is predicated on selected excerpts from Sections 302 and 402 of Executive Order 9841. (R. 130, see Br. in Opp. 4). According to the court below, Section 302 directed "that all price control functions theretofore vested in the Temporary Controls Administrator should be 'transferred to the Secretary of Commerce'" (R. 130). The court goes on to point out that

Section 402 provides that "such transfer of functions should include 'authority on the part of each officer to whom such functions are transferred * * * to *institute, maintain, or defend in his own name* civil proceedings in any court * * * relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer' of functions to him" (emphasis supplied by court) (R. 130). Accordingly, the court concluded that Executive Order 9841 transferred to the Secretary of Commerce "the remaining functions of price control" (R. 130), including maintenance of the pending treble damage actions in his name.

This holding stands alone among the several cases in which the lower federal courts have had occasion to examine these Executive Orders; in all other cases the courts have uniformly held that these Executive Orders vest authority in the Attorney General to maintain the pending treble damage actions in the name of the United States. *Hal-Mar Dress Co.* v. *Clark, Director, Division of Liquidation, Department of Commerce*, 165 F. 2d 222 (E. C. A.); *Fleming* v. *Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nom. Goodwin* v. *United States*, 334 U. S. 828; *Porter* v. *Steger*, 74 F. Supp. 109, 113 (D. Md.); *Fleming* v. *People's Natural Gas Co.*, 8 F.R.D. 42, 45 (W. D. Pa.); cf. *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9).

In the *Hal-Mar Dress* case, the Emergency Court of Appeals had before it a petition to review a determination made under Section 205(e) of the Emergency Price Control Act by the Department of Commerce's Director of the Division of Liquidation.[7] On that petition, the Emergency Court held that it had no jurisdiction to review the "purported determination" because the Director had no power to make the determination. This power, the court noted, went with the power to maintain the related treble damage action under that Section. On a careful examination of the Executive Orders, the court ruled that the power was the Attorney General's (165 F. 2d at 224):

> It appears that the Attorney General has taken over from the Temporary Controls Administrator the conduct of the suit for treble

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[7] The *Hal-Mar Dress Co.* case involved that part of Section 205 (e) (added by Section 12 of the Price Control Extension Act of 1946, 60 Stat. 677) which provides that:

> The Administrator shall not institute or maintain any enforcement action under this subsection against any manufacturer of apparel items where the Administrator shall determine (1) that the transactions on which such proceeding is based consisted of the manufacturer's selling such an item at his published March 1942 price list prices instead of his March 1942 delivered prices, and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceilings be the March 1942 delivered prices. The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with sections 203 and 204.

Thus, the question in the case was whether the power to make such determinations was vested in the Secretary of Commerce or in the Attorney General.

damages for violation of Maximum Price Regulation 287 which had been instituted against the defendant * * *. This was the suit brought under Section 205(e) with respect to which the determination here in question was sought. In that suit, on the Attorney General's motion, the United States has been substituted as plaintiff in place of the Temporary Controls Administrator. It will thus be seen that the Attorney General is presently engaged in maintaining that suit pursuant to the authority conferred on him by Executive Order 9842.

If, as is evident, the Attorney General has succeeded to the Administrator's function of maintaining the suit he has necessarily acquired also the discretionary authority to settle or dismiss it.

* * * * * *

Our conclusion is that the duty to make the determination called for by the last paragraph of Section 205(e) was transferred to the Attorney General under Executive Order 9842 and, therefore, did not pass to the Secretary of Commerce under the residuary clause of Paragraph 302 of Executive Order 9841. It follows, as stated at the outset, that the Director of the Division of Liquidation of the Department of Commerce, whom the Secretary of Commerce designated to perform his functions under Executive order No. 9841, had no authority to make the determination here sought to be reviewed.

Even the court below had previously read the Executive Orders to provide for maintenance of these actions in the name of the United States. In *Bowles* v. *Wilke*, 175 F. 2d 35 (C. A. 7), certiorari denied, 338 U. S. 861, in an opinion written by Judge Lindley, who wrote the opinion here, the court stated (175 F. 2d at 36):

> The President, on April 23, 1947, by Executive Order 9841 * * * terminated the Office of Temporary Controls as of June 1, 1947, and issued Executive Order 9842 * * * effective June 1, 1947, under which *the Attorney General was authorized in the name of the United States to conduct, initiate, maintain or defend actions under the Emergency Price Control Act* * * *. [Italics supplied.][8]

That the holding below is wrong and the court's prior reading of the Executive Orders is correct may easily be demonstrated. Executive Order 9842, which was issued contemporaneously with Order 9841 and which must read in conjunction therewith, in plain language vests authority in the Attorney General to maintain the treble damage actions in the name of the United States. That Order specifically provides (Appendix, *infra*, p. 53):

> 1. The Attorney General is authorized and directed, in the name of the United States or

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[8] See also *supra*, pp. 23-24.

otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

* * * * *

Subparagraph (b) clearly refers to OPA enforcement suits, is not limited to criminal proceedings, and thus is applicable to the instant cases. Furthermore, that subparagraph, unlike the preceding subparagraph (a), does not direct the Attorney General to conduct the litigation on behalf of any specified officers and, consequently, he is authorized to conduct such litigation "in the name of the United States or otherwise as permitted by law" as provided in paragraph 1.[9]

[9] Respondents' contention, that the phrase "or otherwise as permitted by law" limits the scope of the authorization to the Attorney General to maintain these actions in the name of the United States (Br. in Opp. 4-5), is based on the holding below that Section 205(e) sanctions such suits only in the name of the Price Administrator or his successor. This holding, we have demonstrated *supra*, pp. 13ff., is erroneous and hence does not support respondents' position. We read this phrase not to limit but rather to broaden the Attorney General's authority, by permitting him to maintain these actions in the name of the United States, or if he chooses, in any other name permitted by law.

In addition, it should be pointed out that both Sections 302 and 402 of Order 9841 were expressly made subject to the Order 9842, but Order 9842 contains no comparable limitation. Section 302 vests in the Secretary of Commerce not *all* of the price control functions theretofore discharged by the Temporary Controls Administrator, as the court below held (R. 130), but only residual functions, functions which in the words of Section 302, were "not otherwise disposed of by statute or by this or any other Executive Order." This language excludes from the Commerce Secretary's authority not only the price control functions specifically distributed by Section 202 of Order 9841 among the Housing Expediter, the Secretary of Agriculture and the Reconstruction Finance Corporation (see *supra*, pp. 4-5, *infra*, pp. 47-52), but—more important here—the functions vested in the Attorney General by Order 9842. Section 402 is similarly subordinated to Order 9842; the concluding sentence of that section reads:

> The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising under Wartime Legislation" issued on the date of this order and effective June 1, 1947.

When these contemporaneous Orders are thus read in conjunction, we think that the conclusion becomes inescapable that the Orders directed that

the pending OPA enforcement suits be maintained in the name of the United States rather than in the name of the Secretary of Commerce.

There are also several more reasons why in our view the conclusion below is erroneous. In the first place, Section 302 provides that all functions thereby transferred to the Commerce Secretary "shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate." Section 402 defines functions as including authority on the part of each officer to whom such functions are transferred under the Order "to institute, *maintain*, or *defend* in his own name civil proceedings in any court * * * relating to the matters transferred to him * * *." (Italics supplied.) Accordingly, if the court below were correct in holding that Sections 302 and 402 vested authority in the Secretary of Commerce in regard to the pending treble damage actions, it would follow that the Secretary of Commerce would not only be authorized to institute an action in his own name but also so to maintain and defend these actions, and in addition, he would be charged with the furnishing of the staff to handle this litigation.[10] But,

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[10] The task of handling and trying the approximately 4000 enforcement cases pending (*infra*, p. 36, fn. 13) was far too great for the limited legal staff of the Commerce Department. In 1947, there were eleven attorneys, including the Solicitor, in the Solicitor's Office. *The Budget of the United States, for the fiscal year ending June 30, 1949*, p. 404. In 1948, the number was reduced to nine. *The Budget of the United States, for the fiscal year ending June 30, 1950*, p. 425.

as even the court below agreed, Order 9842, at the very least, directed "that the Department of Justice should furnish the staff of manpower, i.e., legal and investigating personnel, necessary effectively to prosecute 'price control enforcement litigation,' in lieu of conduct of such litigation by the staff of the Office of Price Administration." (R. 131). The conflict between these provisions of the Executive Orders comes into being only if one accepts the construction of the Orders given below; no such conflict would result under the construction of the Orders which we have urged *supra*, pp. 24-31.

Moreover, in undertaking to resolve the conflict in favor of Order 9841 and holding that the Department of Justice was to furnish the staff to handle the enforcement cases as replacement for the Price Administrator's staff, the court below accorded only limited recognition to Order 9841's express subjection to Order 9842. There is, however, no basis in the Executive Orders for thus limiting the extent to which 9841 is subordinated to 9842, nor, for that matter, for the resulting division of duties in regard to the pending treble damage actions. The same reasoning which led the court below to recognize even this limited subordination requires that 9841 be completely subjected to 9842, and hence that the authorization in Section 402 to institute

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These figures do not, of course, include attorneys employed by various agencies of the Department such as Civil Aeronautics Administration, Office of International Trade, etc. These attorneys, however, would obviously not be available for the prosecution of OPA enforcement suits.

the action in the name of the head of the administrative agency be held subject to Order 9842. Further militating against the court's holding is the fact that its analogy between the Department of Justice attorneys and the Price Administrator's staff (R. 131) is inappropriate since the relationship between the Department of Justice and the Secretary of Commerce is very different from that between the Price Administrator and his staff. The legal and investigative staff of the Office of Price Administration was subject to the supervision of the Price Administrator who could review their actions. The Attorney General, on the other hand, stands on an equal footing with the Secretary of Commerce and by virtue of paragraph 2 of Order 9842,[11] the Attorney General has complete control over the disposition of this litigation.

An additional difficulty with the construction below is that it is inconsistent with, and distorts the logical scheme of, Section 402 whereby the maintenance of litigation was to be merely an adjunct to the transfer of some function to which the litigation related. The power to sue for damages and injunctions, to compromise or refuse to compromise, is an important and effective aid in the administration of a substantive program. For such reasons, the Price Administrator, under the

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[11] Paragraph 2 provides:

> Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

Emergency Price Control Act, was given complete control over the civil litigation instituted by him under the Act. So, also, under Order 9841, the transfer of administrative functions was accompanied by the authority to conduct related litigation. See, for example, *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112, 114 (C. A. 8). But, with respect to decontrolled commodities such as are involved in these cases, the only thing left to do was to dispose of the suits, and as already pointed out, *supra*, pp. 24-29, 32-33, that power was lodged in the Attorney General by Executive Order 9842. Hence, in regard to such cases, the Secretary of Commerce was vested neither with any functions to which this litigation related, nor, consequently, with authority to maintain the litigation. Under the holding below, the Secretary of Commerce's sole relationship to the treble damage actions was that of lending the use of his name as nominal plaintiff.

Finally, the construction is objectionable for the reason that it reaches a capricious result. The court below, in denying that the result was capricious, commented that "it was not illogical, when the Office of Price Control was abolished, to transfer its activities to the Department of Commerce, for sales in excess of ceiling prices are a part of commerce." (R. 131). But as we have already pointed out, even under the holding below, nothing was transferred to the Secretary of Commerce other than the right to have the suits conducted in

his name as nominal plaintiff. In addition, while the sales when made were undoubtedly a part of commerce, what we are concerned with here are enforcement functions in regard thereto. Cf. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 117. Such functions are generally discharged by the Attorney General and not the Secretary of Commerce.

Supporting our construction of the Executive Orders that the Secretary of Commerce was not intended to have any connection—not even as nominal plaintiff—with the civil litigation in regard to decontrolled commodities is the fact that it accords with the unanimous understanding of the executive agencies affected, the Office of Temporary Controls, the Department of Justice and the Department of Commerce. The Temporary Controls Administrator stated to the Attorney General in a letter dated April 30, 1947, one week after the issuance of the Executive Orders and before their June 1, 1947 effective dates, that his understanding of the Executive Orders was that:

> 1. The Department of Justice will undertake the task of completing the O.P.A. litigation program, so far as decontrolled commodities are concerned, such litigation to be conducted in the name of the United States of America.[12]

And in accordance with this understanding he transferred the files of the pending cases not to the

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[12] The full text of this letter is set out in Appendix B, *infra*, pp. 54-56.

Department of Commerce but to the Department of Justice. The Department of Justice received these files and on May 19, 1947, in anticipation of the effective date, the Attorney General issued Circular 3987 to all United States Attorneys advising them:

> * * * In all OPA cases both in District Court and on appeal, substitute the United States as plaintiff on June 1, 1947, or as soon thereafter as possible.

The Secretary of Commerce has not disagreed with this procedure; he has at no time requested the files, sought to assert jurisdiction over them or over the conduct of the cases, nor has he ever claimed that he properly was, or should have been, substituted as party plaintiff. Indeed, the initial report of the Department of Commerce, Division of Liquidation, states (Interim Program Report of the Division of Liquidation, Department of Commerce, June 1, 1947—September 30, 1947, p. 3):

> A supplementary action was taken in Executive Order 9842, also dated April 23, 1947, which transferred responsibility for continuing (to its conclusion) the OPA enforcement program to the Justice Department.[13]

[13] The report further states (p. 5):

> The transfer of the OPA enforcement function to the Department of Justice involved transmitting approximately 4000 active enforcement cases for prosecution. These cases accounted for 1500 cubic feet of records. At that time also there were 28 price cases pending in the Emergency Court. No personnel were transferred to the Justice Department with this work load.

Such administrative construction of these Executive Orders, consistent and generally unchallenged, is entitled to great weight since it involves a contemporaneous construction by those charged with administering the orders. Cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 549. This is particularly true here, since the Executive Orders undoubtedly were issued as a formalization of agreements, resulting from discussion among the agencies involved and the President, as to the allocation of the functions of the then-to-be liquidated Office of Temporary Controls. Cf. *United States* v. *American Trucking Assns., Inc., ibid.*[14]

III

Rule 25 (d) of the Federal Rules of Civil Procedure Is Inapplicable to Treble Damage Actions Instituted by the Price Administrator on Behalf of the United States Under Section 205 (e) of the Emergency Price Control Act

If the decision below that the Secretary of Commerce is the proper party is affirmed, the large group of treble damage suits typified by these cases will be terminated, unless this Court determines that the Government may now substitute the Secretary as the nominal plaintiff notwithstanding the fact that the six-month period specified in Rule 25 (d) of the Federal

[14] Respondent's contention that reversal of the holding below is precluded by 28 U. S. C. 2105 (Br. in Opp. 11-14) has already been rejected by this Court in *Snyder* v. *Buck*, 340 U. S. 15, 21-22, 31-32.

Rules of Civil Procedure has expired. We contend, therefore, that the requirements of Rule 25 (d) do not apply to the substitution of the United States as plaintiff in actions commenced pursuant to statutory authority in the name of a government officer on behalf of the United States. Accordingly, if this Court holds that the Secretary of Commerce, rather than the United States, should be substituted as plaintiff in these cases, we believe that it should provide that the Government may now substitute the Secretary of Commerce as plaintiff. It has been pointed out (*supra*, pp. 12-24) that the United States, not the Price Administrator, was the real party in interest in these actions, and that they could have been instituted in the name of the United States rather than in the name of the nominal plaintiff—the Price Administrator. Nevertheless, the court below has already held in *Bowles* v. *Wilke*, 175 F. 2d 35, which was followed here, that Rule 25 (d) is applicable in OPA treble damage actions originally instituted by the Price Administrator, and that substitutions must be accomplished within the six-months period prescribed by that rule.

We believe, as was stated in our petition in the *Wilke* case (see Petition for a Writ of Certiorari, No. 299, Oct. Term, 1949, pp. 6-7), that that case glorifies "form over substance and reality" and is in square conflict with decisions on this precise point by three other courts of appeals. *Fleming* v. *Goodwin*, 165 F. 2d 334 (C. A. 8), certiorari

denied *sub nom. Goodwin* v. *United States*, 334 U. S. 828; *United States* v. *Koike*, 164 F. 2d 155 (C. A. 9); *Northwestern Lumber & Shingle Co.* v. *United States*, 170 F. 2d 692 (C. A. 10).[15] The reason why we believe Rule 25(d) to be inapplicable here is that we are concerned not with substituting a successor in office, as to which Rule 25(d) is applicable, but rather with the question whether an action commenced pursuant to statutory authority in the name of a government officer on behalf of the United States may be continued in the name of the United States, or in the name of another official on behalf of the United States. Substitution in such an action need not, we submit, comply with the requirements of Rule 25(d), which is concerned solely with cases in which the United States theoretically has no direct interest and in which it is not the real party in interest.[16]

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[15] See, also, *Porter* v. *Maule*, 160 F. 2d 1 (C. A. 5); *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112 (C. A. 8); *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4); *United States* v. *Seigel*, 168 F. 2d 143, 147 *et seq.* (C. A. D. C.), (Judge Edgerton dissenting); *Porter* v. *Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.); *Fleming* v. *People's Natural Gas Co.*, 8 F. R. D. 42 (W. D. Pa.). Moreover, in entering final judgment in *Bowles* v. *Babar*, 54 F. Supp. 453, 455 (E. D. Mich.), the court, on its own motion, substituted Chester Bowles for Prentiss Brown as Price Administrator "for orderliness of this record." Indeed, in several federal district courts, general orders of substitution in OPA treble damage action were issued. See, *e. g.*, *Bowles* v. *Weiner*, 6 F. R. D. 540 (E. D. Mich.); *Bowles* v. *Goldman*, 7 F. R. D. 12 (W. D. Pa.); *In re Creedon*, 7 F. R. D. 546 (W. D. N. Y.); *Porter* v. *Sands*, 74 F. Supp. 494 (E. D. N. Y.).

[16] *Fleming* v. *Mohawk Co.*, 331 U. S. 111, relied on by the

The history of Rule 25(d) supports this conclusion. Rule 25(d) is the modern version of legislation originally adopted (Act of February 8, 1899, c. 121, 30 Stat. 822) at the suggestion of this Court in *United States ex rel. Bernardin* v. *Butterworth*, 169 U. S. 600. In that case, this Court had held that a suit to compel the Commissioner of Patents to issue a patent was abated by the death of the Commissioner and that it could not be revived in the name of his successor, even with the latter's consent. This principle was applied in suits where the action of the government official involved was personal in nature and the officer was required personally to perform his official duties. At the same time, it had also been held that where the duty involved was not personal but rather was an adjunct to a continuing office, the suit would not abate upon the incumbent's departure from the office. For example, in *Thompson* v. *United States*, 103 U. S. 480, it was held that a suit against a township clerk, which in reality was a suit against the township to enforce collection of a judgment, did not abate upon the resignation of the clerk. See, also, *Murphy* v. *Utter*, 186 U. S. 95; *In re Hollon Parker*, 131 U. S. 221; *Commissioners* v. *Sellew*,

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Seventh Circuit in the *Wilke* case is inapplicable here. The question there was whether there had been compliance with Rule 25(d); no question was raised whether such compliance was necessary for the further maintenance of the action. Cf. *Fleming* v. *Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nomine Goodwin* v. *United States*, 334 U. S. 828.

99 U. S. 624. When, as here, the suit is brought by a named officer on behalf of the United States, the suit is, of course, not a personal action falling within the rule of the *Butterworth* case.[17]

In the *Butterworth* case, this Court recognized the distinction between these two situations (169 U. S. at 603, 604), and in there holding the cause to be abated because the duty was personal, the Court suggested (169 U. S. at 605):

> In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, *in the case of suits against the heads of departments abating by death or resignation,* it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method. [Italics supplied.]

To meet this suggestion, H. R. 6901, entitled "a bill to prevent the abatement of certain actions,"

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[17] *Snyder* v. *Buck*, 340 U. S. 15, is, we believe, distinguishable from the instant cases and falls within the *Butterworth* line of cases. In the *Snyder* case, plaintiff instituted a suit for a mandatory injunction against Admiral Buck, Paymaster General of the Navy, requiring him to pay a death gratuity claimed to be due plaintiff under applicable statutes but failed to substitute Admiral Buck's successor within six months after he had taken office. Though the Court held that the suit was not "against Buck personally" (340 U.S. at 18), in the sense that it did not seek money from him in his personal capacity, the Court did not depart from the *Butterworth* case which held that in these mandamus suits "the duty is personal with the officer" and "the delinquency charged is personal." 169 U.S. at 603-4.

was introduced shortly thereafter. 31 Cong. Rec. 779. The purpose of this bill, as explained in the House Committee report (H. Rep. No. 960, 55th Cong., 2d sess.) and by the member of the House who reported the bill from the Committee (31 Cong. Rec. 3865-3866) was to permit the suit to survive and avoid the necessity of compelling a party to commence a new action against the successor in office. The Act, as then enacted, was not intended to affect—nor was there any need to affect—the situation where the departure of the named officer from office did not result in abatement. *Murphy* v. *Utter*, 186 U. S. 95, 101-102; *Marshall* v. *Dye*, 231 U. S. 250, 255; *Irvin* v. *Wright*, 258 U. S. 219, 224. In *Fleming v. Goodwin, supra*, the court of appeals stated (165 F. 2d at 337):

> The purpose of the Rule, like that of the statute which it superseded, was to provide for the continuance of an action, personal in character, brought by or against a public officer, where a substantial need for continuing the action existed and the action could not, without statutory authority, be maintained against his successor after the officer had ceased to hold office. The statute therefore was intended to cover only such actions, to which a public officer was a party, as would abate upon his separation from office. The need for the statute did not arise out of the death or resignation of Government officers who had brought actions on behalf of the Government. Such a statute was needed because

> the Supreme Court had ruled, in a number of cases, that actions brought against public officers to compel personal performance of their official duties could not be continued as against their successors, even though the successors consented.

Although the Act of 1899 was replaced by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941, 28 U. S. C. (1946 ed.) 780), which in turn was omitted from the revision of Title 28 in 1948 for the stated reason that the same ground is covered by Rules 25 and 81 of the Federal Rules of Civil Procedure (H. Rep. No. 308, 80th Cong., 1st sess., A 239), there is nothing in the subsequent history of the provision to indicate that the purpose of the provision was ever converted from being "purely remedial, designed to remove what this court in the *Butterworth* case called an 'inconvenience'." (*Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, 533). To construe Rule 25(d) as applying to the instant cases, which historically would not abate even if no substitution were made, would not only violate the mandate of Rule 1, that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action",[18] but would also hamper "the Govern-

[18] Although, in the instant cases, the United States may be barred from reinstituting these cases because of the one-year statute of limitations applicable to treble damage actions (Section 205(e) of the Emergency Price Control Act), the application of the ruling here sought by respondent would cause serious inconvenience to private litigants in similar situations arising in related fields (cf. *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C. A. 4)).

ment in its efforts, through its proper officers, to enforce its laws or to obtain judgment for money rightfully due it or for statutory damages. The Rule was never intended to relieve defendants, in actions brought on behalf of the Government, of their statutory liability to the Government." *Fleming* v. *Goodwin, supra,* at 337-338.[19]

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[19] *Fix* v. *Philadelphia Barge Co.*, 290 U. S. 530, and *Defense Supplies Corp.* v. *Lawrence Warehouse Co.*, 336 U. S. 631, relied on by the Seventh Circuit in the *Wilke* case (175 F. 2d 35 at 38-39), are distinguishable. The *Lawrence Warehouse* case is based on the special statute relating to the dissolution of the Defense Supplies Corporation. See 336 U. S. at 635-636, fn. 6. The *Philadelphia Barge* case, on the other hand, involved a situation where a new suit had been brought in the name of a successor Collector of Internal Revenue on a bond executed to a named Collector "or his successors", after an earlier suit had been held by a district court to be abated for failure to comply with 28 U. S. C. 780, the statutory predecessor of Rule 25(d). The question before this Court related not to the survival of a specific pending action but rather to the survival of the *cause* of action itself. This Court, in deciding that the cause of action had not abated, had no occasion to, nor did it, pass upon the propriety of the district court's holding that the earlier action had abated. Indeed, in discussing the impact of the Act of 1899, the Court, as quoted above in the text, specifically recognized its remedial purpose. See *supra*, p. 43.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below is erroneous and should be reversed. In the alternative, if it is held that the United States is not the proper plaintiff in these cases, we request this Court to remand the cases with leave to the Government to substitute the Secretary of Commerce as plaintiff.

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NEWELL A. CLAPP,
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FEBRUARY 1951.

APPENDIX A

1. Executive Order No. 9841 (12 Fed. Reg. 2645) provides:

TERMINATION OF THE OFFICE OF TEMPORARY CONTROLS

WHEREAS the Congress, in the Urgent Deficiency Appropriation Act, 1947, approved March 22, 1947, has declared its intent that the Office of Temporary Controls be closed and liquidated by June 30, 1947; and

WHEREAS it is necessary to provide for the orderly liquidation of such Office and the disposition of its residual affairs:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes, including the last paragraph of Title I of the First Supplemental Surplus Appropriation Rescission Act, 1946, approved February 18, 1946, Title III of the Second War Powers Act, 1942 as amended by the First Decontrol Act of 1947, section 201 (b) of the Emergency Price Control Act of 1942, as amended, section 2 of the Stabilization Act of 1942, as amended, and Title I of the First War Powers Act, 1941, and as President of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

PART I

101. The Office of Temporary Controls, established by Executive Order No. 9809 of December 12, 1946, shall be terminated and

disposition shall be made of its functions according to the provisions of this order.

PART II

201. The provisions of this Part shall become effective on May 4, 1947.

202. Functions of the Temporary Controls Administrator under the Emergency Price Control Act of 1942, as amended, Executive Order No. 9809, and any other statute, order, or delegation are transferred as follows:

(a) Functions with respect to rent control are transferred to the Housing Expediter and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Government as he may designate.

(b) Functions with respect to price control over rice are transferred to the Secretary of Agriculture and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Agriculture as he may designate.

(c) Functions with respect to (1) subsidies, including determinations of the correct amounts of claims and the recovery of overpayments (but excluding premium-payment functions transferred under paragraph 302 (b) hereof); (2) applications for price adjustments filed under Supplementary Order 9 and Procedural Regulation 6 (Adjustment of Maximum Prices for Commodities and Services under Government Contracts or Subcontracts, 7 F. R. 5087, 5444) of the Office of Price Administration; and (3) the interpre-

tation and application of price and subsidy regulations and orders which affect the amount of subsidy payable; are transferred to the Reconstruction Finance Corporation.

203. The following functions of the Temporary Controls Administrator are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of Commerce as he may designate:

(a) Functions of the President under Title III of the Second War Powers Act, 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to determining, under section 6 (a) of the Strategic and Critical Materials Stockpiling Act, the amount of strategic and critical materials necessary to make up any deficiency of the supply thereof for the current requirements of industry.

(c) Functions under section 124 of the Internal Revenue Code, as amended.

(d) Functions under section 12 of the act of June 11, 1942 (the Small Business Mobilization Act).

(e) Functions with respect to claims relating to the expansion of the capacity of defense plants when such expansion is alleged to have been undertaken at the request of the War Production Board or any of its predecessor agencies.

(f) Functions with respect to claims relating to property requisitioned by the Chairman of the War Production Board or by any of his predecessors.

(g) Except as otherwise provided by statute or this or any other Executive order, all other functions of the Temporary Controls Administrator which were immediately prior to the taking of effect of Executive Order No. 9809 vested in the Civilian Production Administrator.

204. Executive Order No. 9705 of March 15, 1946 (as modified by Executive Orders Nos. 9762 and 9809) is revoked.

205. Any authority vested in the Temporary Controls Administrator in pursuance of section 120 of the National Defense Act of 1916 (with respect to placing compulsory orders for products or materials) is withdrawn and terminated.

PART III

301. The provisions of this Part shall become effective June 1, 1947.

302. All functions vested in the Temporary Controls Administrator by Executive Order No. 9809 not otherwise disposed of by statute or by this or any other Executive order are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate. Such functions shall include, but not be limited to, the following:

(a) Functions of the President under the Stabilization Act of 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to premium payments under section 2 (e) (a) (2) of the Emergency Price Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores.

(c) Functions with respect to the establishment of maximum prices for industrial alcohol sold to the Government or its agencies.

(d) The liquidation of the functions of the Office of Temporary Controls and of the agencies thereof, except liquidation relating to functions specifically transferred to other agencies (by the provisions of this order or otherwise).

303. The Office of Temporary Controls is terminated.

PART IV

401. The provisions of this Part shall become effective, respectively, on the dates on which functions are transferred or otherwise vested by the provisions of this order.

402. Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in

any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising under Wartime Legislation," issued on the date of this order and effective June 1, 1947.[20]

403. (a) The records, property, and personnel relating primarily to the respective functions transferred under the provisions of this order shall be transferred, and the funds relating primarily to such respective functions shall be transferred or otherwise made available, to the agencies to which such functions are transferred. Such measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director may determine and by such agencies as he may designate.

(b) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred hereunder shall be so restricted by the respective agencies as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly

[20] See E. O. 9842, *infra*.

related, except as provided for by law or as required in the final disposition thereof pursuant to law.

404. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior and currently effective orders, rules, regulations, directives, and other similar instruments relating to any function transferred by the provisions of this order or issued by any agency terminated hereunder or by any predecessor or constituent agency thereof, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

405. As used in this order, "functions" includes powers, duties, authorities, discretions, and responsibilities.

HARRY S. TRUMAN

THE WHITE HOUSE,
April 23, 1947.

2. Executive Order No. 9842 (12 Fed. Reg. 2646) provides:

CONDUCT OF CERTAIN LITIGATION ARISING UNDER WARTIME LEGISLATION

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, and as President of the United States, and having regard to the established responsibilities and powers of the Department of Justice and of the Attorney General under

the statutes of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

1. The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

(c) Litigation arising out of Directive 41, as amended, of the Office of Economic Stabilization pertaining to the withholding of subsidies because of noncompliance with or violations of control orders.

2. Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

3. The functions and duties of the Attorney General under this order shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Justice as he may designate, and there shall be made available to the Attorney General, pursuant to the provisions of Executive Order No. 9784 of September 25, 1946,

any files or records pertinent to the subject matter hereof.

4. This order shall become effective June 1, 1947.

HARRY S. TRUMAN.

THE WHITE HOUSE,
April 23, 1947.

APPENDIX B

The letter of the Administrator, Office of Temporary Controls to the Attorney General, dated April 30, 1947, reads as follows:

OFFICE OF TEMPORARY CONTROLS

Washington, D. C., April 30, 1947.

MY DEAR MR. ATTORNEY GENERAL:

Now that the President has signed the two Executive Orders issued in connection with the prospective dissolution of the Office of Temporary Controls, it may be useful for me to advise you of my understanding of the arrangements desired by you with reference to the termination of the Office of Price Administration. My understanding is as follows:

1. The Department of Justice will undertake the task of completing the O. P. A. litigation program, so far as decontrolled commodities are concerned, such litigation to be conducted in the name of the United States of America.

2. The Department of Justice will undertake the task of conducting all litigation in

the Emergency Court of Appeals, except on behalf of the Housing Expediter who will conduct his own litigation in that court;

3. The Department of Justice will not take on any O. P. A. attorneys or other personnel now connected with the above functions;

4. The assumption by the Department of Justice of the above responsibilities, including the case records relating thereto, will become effective June 1, 1947, and after that date the Department of Justice will have sole responsibility for this litigation;

5. The O. P. A. personnel now engaged in work on the programs set out above will be given termination notices to be effective not later than May 31, 1947, except as certain of such personnel are needed by the Department of Commerce for other activities.

It may perhaps be well for me to call your attention to one difficulty that we must both face in connection with the foregoing. As you will realize, the present O. P. A. legal and enforcement staff is designed to handle the current sizeable workload of active litigation. Although some work has also been done on the preparation of case records for use by the Department of Justice, progress has been necessarily slow because of personnel limitations and in no event will it be possible to complete the indexed transmittals even for all the more important cases prior to June 1. Nevertheless, we will continue to put forth our best efforts on this so as to lighten your task after that date.

I should greatly appreciate an expression from you of your concurrence in the understanding outlined above and in closing I can assure you that you can count on our full cooperation in effectuating the transfer.

Sincerely yours,

(S.) PHILIP B. FLEMING,
Major General, U. S. A.,
Administrator.

The Honorable
The ATTORNEY GENERAL OF THE UNITED STATES.

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